ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign Participation	)	
in the U.S. Telecommunications Market	)	

REPLY COMMENTS OF

GTE SERVICE CORPORATION

GTE Service Corporation and its affiliated telecommunications carriers

Ward W. Wueste
GTE Service Corporation
One Stamford Forum
Stamford, CT 06904
(203) 965-2000

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

R. Michael Senkowski
John B. Reynolds, III
Todd D. Daubert
Davida M. Grant
Jennifer D. Wheatley

of

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

ITS ATTORNEYS

Dated: August 12, 1997

EXECUTIVE SUMMARY

The global basic telecommunications agreement ("GBT Agreement") has the potential to change fundamentally the provision of international communications services. For the United States, the major achievement of the GBT Agreement is the binding commitment of other countries to open their telecommunications markets to effective competition. Although the Commission's proposed rules respond to the GBT Agreement and represent important steps in the right direction, they could better serve the broad U.S. interest by more fully embracing the goal of open market entry and accelerated global competition. GTE remains concerned that the Commission's approach risks inviting foreign countries to impede access to their markets by raising new barriers to entry justified as competitive safeguards.

The Commission should more forthrightly acknowledge the impact of the GBT Agreement on U.S. market access rules. In many cases, the concerns expressed by commenters could be overcome by greater clarity about U.S. determination to observe scrupulously its international obligations. Among other things, the Commission should more clearly acknowledge (and its rules should more clearly reflect) that the consideration for opening the U.S. market is the collective undertaking of other GBT Agreement signatories to open their own markets to foreign participation. Parties to the GBT Agreement have undertaken substantial commitments to open their markets and prevent competitive abuses in accordance with the procompetitive principles of the Reference Paper. These undertakings, which need not exactly mirror U.S. undertakings, eliminate the need for the Commission's case-by-case reciprocity standard.

Arguments in favor of retaining extensive market entry conditions ignore or too steeply discount the market opening and pro-competitive regulatory commitments in the GBT

Agreement. GTE is convinced that genuine competition engendered by these commitments will protect U.S. interests better than any set of regulations. Accordingly, GTE suggests that the Commission revise its market access rules to take full advantage of the GBT Agreement, especially by focusing on post-entry mechanisms for protecting the U.S. market from anticompetitive practices. Continued reliance on pre-entry conditions unnecessarily risks a protectionist stance from other countries that could impair the GBT Agreement's effectiveness as a market-opening tool to the detriment of U.S. telecommunications providers seeking access to foreign markets.

TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY i

INTRODUCTION 1

I. THE COMMISSION SHOULD EXPRESSLY ACKNOWLEDGE THAT THE GBT AGREEMENT BINDS THE UNITED STATES AND THAT THE ECO TEST IS LARGELY INCONSISTENT WITH THE GBT AGREEMENT. 4

A. The NPRM And Supportive Commenters Ignore Important Aspects Of The GBT Agreement And Focus Exclusively On "Competitive Safeguards" In The Reference Paper. 5

B. The ECO Test Is Largely Inconsistent With GATS And Should Be Acknowledged As Such. 7

1. Legal Opportunity Factor 8

2. Practical Opportunities Factors 9

II. THE COMMISSION SHOULD CLARIFY THAT IT INTENDS TO RELY ON "OTHER PUBLIC INTEREST FACTORS" IN MARKET ACCESS DECISIONS ONLY TO THE EXTENT CONSISTENT WITH GATS 11

A. The Commission Should Distinguish Clearly Among The "Other Public Interest Factors" Mentioned In The NPRM 13

1. National Security 14

2. Law Enforcement 15

3. Foreign Policy and Trade Concerns 16

B. The Commission Should Better Articulate Its Approach to Public Interest Factors 17

III. CONDITIONING MARKET ACCESS ON PRESCRIBED ACCOUNTING RATES EXCEEDS THE COMMISSION'S JURISDICTION AND IS INCONSISTENT WITH U.S. OBLIGATIONS 17

A. The United States Lacks Authority To Prescribe Accounting Rates. 18

B. Conditioning Access To The U.S. Market On Accounting Rates Within The Benchmarks Violates U.S. Obligations Under The GBT Agreement And GATS. 19

C. The "Price Squeeze" Theory Does Not Support The Market Access Conditions Suggested In The NPRM And By Certain Commenters. 20

1. The Price Squeeze Theory Ignores the Reality of Developing Global Competition. 20

2. Effective Post-Entry Safeguards are Available to Address Anticompetitive Behavior, Including GBT Agreement Obligations, U.S. Antitrust Law, Commission Regulatory Powers and WTO Processes. 21

IV. THE NPRM'S ANALYSIS OF MARKET POWER UNDERVALUES THE GBT AGREEMENT AND REFERENCE PAPER. 25

A. The Commission Should Not Ignore That The GBT Agreement And Reference Paper Were Negotiated And Signed In A Business And Regulatory Context Characterized by Market Dominance. 25

B. The Commission's Market Entry Criteria Appear To Presume Other Countries Will Not Implement Their GBT Agreement And Reference Paper Commitments. 26

V. THE U.S. MARKET CAN BE ADEQUATELY PROTECTED FROM ANTICOMPETITIVE BEHAVIOR BY POST-ENTRY SAFEGUARDS. 27

A. Post-Entry Safeguards, Unlike Market Entry Conditions, Will Not Violate NT or U.S. Market Access Commitments. 27

B. The Commission Has Not Demonstrated That Post-Entry Reporting Or Other Requirements Will Fail To Protect The U.S. Market. 28

VI. THE UNITED STATES SHOULD LEAD BY EXAMPLE AND SHOULD MAKE CLEAR THAT IT EXPECTS FULL GBT AGREEMENT COMPLIANCE FROM OTHER WTO MEMBERS. 29

CONCLUSION 30

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REPLY COMMENTS OF GTE SERVICE CORPORATION

INTRODUCTION

GTE Service Corporation and its affiliated telecommunications carriers (collectively "GTE"), file these reply comments in response to the comments filed in the Federal Communications Commission ("Commission") Notice of Proposed Rulemaking on Foreign Participation in the U.S. Telecommunications Market ("NPRM").[1]

The World Trade Organization's ("WTO") global basic telecommunications agreement ("GBT Agreement")[2] represents a landmark in international telecommunications services, especially in its potential to open foreign markets to international competition. GTE firmly believes that actual competition will move rates and rationalize traffic flows in ways no regulator could ever duplicate. As reflected in its opening comments, however, GTE is concerned that the NPRM fails to embrace fully the potential represented by the GBT Agreement. Instead, the

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[1] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket No. 97-142, FCC 97-195 (rel. June 4, 1997), Order and Notice of Proposed Rulemaking [hereinafter "NPRM"].

[2] *World Trade Organization Group on Basic Telecommunications*, Fourth Protocol to the General Agreement on Trade in Services (February 15, 1997) [hereinafter "GBT Agreement"].

NPRM seeks to retain for the Commission powers over entry into the U.S. market that are inconsistent with the GBT Agreement and the General Agreement on Trade in Services ("GATS").[3] Moreover, even if the measures were legally defensible under the GATS, they are unnecessary. They invite other WTO Members to renege on their GBT Agreement commitments and cause the Commission to miss the opportunity to set an example of scrupulous compliance with the terms of the agreement, an example the U.S. could then call on others to match.[4]

The premier achievement of the GBT Agreement and the Reference Paper On Pro-Competitive Regulatory Principles ("Reference Paper")[5] is *effective* access to foreign markets and the chance for U.S. entities to compete in these markets on an even (or near-even) footing with established domestic players. This opportunity should not be lost by trying to retain unnecessarily too many bases for denying entry to the U.S. market. The Commission would better serve the public interest through an active commitment to open entry to the U.S. market, coupled with post-entry safeguards to ensure that anticompetitive practices are detected, remedied and appropriately sanctioned.

The Commission's GBT Agreement implementation would attract less criticism if it were based on a forthright acknowledgment that the GBT Agreement not only permits but compels a reexamination of existing market access rules. The United States has accepted, in a binding

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[3] *General Agreement of Trade in Services,* April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994) [hereinafter "GATS"].

[4] *See* Comments of the European Union ("European Union") at 2 (expressing its concern that the NPRM could have a negative impact on the implementation of the commitments of other WTO Members).

[5] *Reference Paper on Pro-Competitive Regulatory Principles*, GBT Agreement (February 15, 1997) [hereinafter "Reference Paper"].

treaty, that the GBT Agreement "offers" of other WTO Members, taken as a whole, are sufficient consideration for opening the U.S. market on January 1, 1998. This agreement necessarily spells the end of the Commission's current service-by-service, country-by-country approach to reciprocity. Instead of seeking to extend that approach, the Commission should acknowledge that it is no longer tenable.

The Commission's proposals for the consideration of "other public interest factors" in evaluating market access applications could be enormously improved by expressly relating those factors to the GATS. Executive branch agencies' concerns about protecting essential national security and law enforcement interests can be addressed within the existing treaty framework; the GBT Agreement does not prescribe the deference due such agencies in making decisions. Foreign commenters' reservations about the use of vague and open-ended foreign policy and trade concerns should be alleviated by the Commission stating clearly the intent to apply its rules consistent with U.S. GATS obligations.

GTE continues to oppose conditioning U.S. market access on accounting rates falling within ranges prescribed by the Commission. GTE questions the Commission's legal authority to impose accounting rates unilaterally. Moreover, making benchmark rates a condition of entry would violate U.S. obligations under the GATS. The Commission's proposal would subject affiliates of a dominant carrier in a foreign market to an entry criterion not applicable to non-affiliates seeking to provide the same service on the same route.

Arguments in favor of retaining extensive market entry conditions seem largely to ignore the crucial pro-competitive regulatory commitments made by GBT Agreement signatories. U.S. carriers suspecting anticompetitive practices by foreign-based companies will have recourse not only to the Commission, but to independent regulators in other countries with a treaty-based

obligation to prevent anticompetitive behavior. In this environment, there is more reason than ever to consider that existing post-entry remedies, supplemented, as necessary, by additional reporting requirements and an expedited complaint procedure, can amply protect the U.S. market.

GTE urges the Commission and the Executive branch to remain actively engaged in the process of opening foreign markets and ensuring that access to such markets results in real (rather than merely formal) opportunities for U.S. service providers. The NPRM should be modified to reflect the U.S. commitment to opening the global telecommunications market to effective competition rather than too narrowly focusing on threatened or speculative harms to a robustly competitive U.S. market.

I. THE COMMISSION SHOULD EXPRESSLY ACKNOWLEDGE THAT THE GBT AGREEMENT BINDS THE UNITED STATES AND THAT THE ECO TEST IS LARGELY INCONSISTENT WITH THE GBT AGREEMENT.

The NPRM speaks in terms of "changed circumstances" and "fundamental marketplace changes"[6] permitting the Commission to modify its entry policy for foreign carriers. Yet, the NPRM fails to acknowledge clearly that the GBT Agreement and Reference Paper constitute binding international legal commitments of the United States that compel certain changes in U.S. regulatory policy.[7]

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[6] NPRM ¶¶ 3, 6.

[7] The European Union's comments in this proceeding echo this point. *See* European Union at 2 ("current re-examination primarily relies on the sole merit of US domestic rules rather than one compelled by its obligations under the GATS/WTO Agreement"). More broadly, the European Union's views, especially as to those provisions of the NPRM inconsistent with the GBT

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The broad fundamental goal of the GBT Agreement – the opening of foreign markets to genuine competition – would be well served if the Commission candidly acknowledged that many of the provisions of its current market entry tests are not compatible with the new legal regime and that, accordingly, the Commission will exercise its authority to bring the United States fully into compliance with its obligations. This posture would both accurately reflect the reality of the GBT Agreement as a binding treaty and provide a solid basis for U.S. insistence that other GBT Agreement signatories make whatever legal changes are necessary to comply fully with the agreement.

A. The NPRM And Supportive Commenters Ignore Important Aspects Of The GBT Agreement And Focus Exclusively On "Competitive Safeguards" In The Reference Paper.

Reading the NPRM, one might conclude that the competitive safeguards provision of the Reference Paper was the central aspect of the GBT Agreement. The Reference Paper is an "Additional Commitment" within the treaty structure of the GATS. Accordingly, the Reference Paper is not an exception to, or modification of, fundamental, underlying GATS and GBT Agreement commitments to open markets, extend most favored nation ("MFN") treatment to

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Agreement or the GATS, should be accorded considerable weight by the Commission, as they represent the views of a governmental party to the GBT Agreement with overall goals similar to those of the United States. As reflected in its initial comments and these reply comments, GTE agrees that the United States, as a "major trading nation" deeply involved in propelling the GBT Agreement to conclusion, bears a "special responsibility" to implement the Agreement in a way that promotes rather than jeopardizes effective implementation by other WTO Members.

other signatories and commit to non-discrimination principles.[8] Implementation of the Reference Paper, including implementation of "competitive safeguards," must conform to the GATS and the GBT Agreement.

The Reference Paper in its entirety contains critically important general regulatory principles designed to promote and facilitate competition, but leaves to signatory countries how those principles will be implemented.[9] In any case, the Reference Paper cannot be implemented by enacting, or retaining, laws or regulations inconsistent with a Member's broader WTO obligations.[10] The Reference Paper does not excuse or justify extending less favorable treatment to carriers from some WTO Members than to carriers from the United States or other WTO Members in violation of the GATS or the GBT Agreement. The Commission's focus on the

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[8] *See, e.g.,* European Union at 2 (remarking that the FCC fails "to bring evidence of the compatibility of its proposed rules with the multilateral trade system agreed by WTO Members"); Comments of Telefónica Internacional de España ("Telefónica Internacional") at 13 (noting that the Commission cannot utilize the Reference Paper as a basis for deviating from MFN and NT requirements).

[9] Among other things, the Reference Paper is not an international agreement to adopt the standards and procedures of the Telecommunications Act of 1996. *See* n.51, *infra; see, e.g.,* Comments of SBC Communications Inc. ("SBC") at 4-5 (noting that foreign implementation of the GBT Agreement need not be identical to U.S. implementation); Comments of United States Telephone Association ("USTA") at 3 (noting that the U.S. model should not be construed as the only regulatory model that will satisfy the open entry and pro-competition requirements of the GBT Agreement and the Reference Paper); Comments of the Office of the United States Trade Representative ("USTR") at 3 (noting that foreign implementation need not "mirror" U.S. law).

[10] *See, e.g.,* Comments of Deutsche Telekom AG and Deutsche Telekom, Inc. ("Deutsche Telekom") at 14-15 (noting that the FCC misinterprets the status of the Reference Paper as a part of the GBT Agreement); Comments of Sprint Communications Company, L.P. ("Sprint") at 4-5 (noting that the Reference Paper does not permit continuation of the ECO test); Comments of Teléfonos de México, S.A. de C.V. ("Telmex") at 5-6 (noting that the Reference Paper does not authorize the Commission to deny entry to a foreign carrier from a WTO member country); *Cf.* Comments of AT&T Corp. ("AT&T") at 18-19 (claiming that market entry should be blocked unless the Reference Paper is implemented and competition is permitted).

competitive safeguards provision of the Reference Paper risks obscuring the broader purpose of the GBT Agreement and the political and business context in which it was accepted by the United States and 68 other countries.

B. The ECO Test Is Largely Inconsistent With GATS And Should Be Acknowledged As Such.

The Commission's effective competitive opportunities ("ECO") test, promulgated in the *Foreign Carrier Entry Order*,[11] is, in many respects, inconsistent with the GBT Agreement. To that extent, it must be modified or abandoned by the Commission. Although AT&T, urging the Commission to retain the ECO test, correctly observes that the Reference Paper requires no particular test of competitive harm,[12] it misleads in inviting the conclusion that the ECO test is GATS-consistent.[13] The ECO test is not only inconsistent with the GATS and U.S. market access commitments in the GBT Agreement, it is also unnecessary. The GBT Agreement and Reference Paper effectively address the same anticompetitive harms the ECO test was designed

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[11] *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd 3873 (1995), *recon. pending* [hereinafter "Foreign Carrier Entry Order"].

[12] *See* AT&T at 1-3 (arguing that the ECO test should be retained).

[13] *See id.* at 1-3, 16 (arguing that the GBT Agreement does not affect the Commission's ability and obligation to protect the U.S. market against competitive harm). AT&T is correct in observing that neither the GATS nor the GBT Agreement prevents the Commission from taking reasonable steps to protect competition in the U.S. market. It is plainly incorrect, however, to suggest that the GBT Agreement does not limit the mechanisms available to the Commission for effecting such protection. As demonstrated, some ECO test factors cannot be reconciled with U.S. GBT and GATS obligations.

to prevent, and provide enforcement mechanisms to ensure that GBT Agreement signatories comply with their GATS obligations.[14]

The ECO test was designed for an international environment of very limited competition and no multilateral framework for market access. Thus, the test had two important functions: protecting the competitive U.S. market from distortion and prying open foreign markets. The GBT Agreement and Reference Paper fundamentally alter the international telecommunications environment. The need for preemptive action to protect the U.S. market from competitive distortion should be eliminated by other WTO Members' implementation of their GBT Agreement obligations. Moreover, the United States has accepted the GBT Agreement offers of 68 other countries as an adequate basis for opening its own market. Accordingly, the country-by-country, route-by-route reciprocity of the ECO test is inappropriate under the GBT Agreement.

1. Legal Opportunity Factor

Under the ECO test, a foreign-affiliated applicant for Section 214 authority to provide international services must first demonstrate that a U.S. carrier is legally able to provide the particular service at issue in the destination country. This requirement cannot be reconciled with the GBT Agreement and the GATS.[15] The United States agreed in its GBT Agreement offer to

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[14] *See* Comments of BT North America, Inc. ("BTNA") at 1-3 (noting that WTO Members will implement their GBT Agreement and Reference Paper commitments protecting against anticompetitive behavior in a timely fashion).

[15] *See, e.g.,* European Union at 7 (noting that retention of the ECO test would be "against the spirit of open market entry underlying the WTO Agreement and against the U.S. commitments under such Agreement"); Comments of Cable & Wireless, plc ("C&W") at 2-3 (arguing that the ECO test should be eliminated because it is no longer needed following adoption of the GBT

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open U.S. telecommunications markets despite the fact that not all GBT Agreement signatories agreed to grant the same degree of access to their markets. The Commission would violate the U.S. GBT Agreement offer by denying market access to carriers from a GBT Agreement signatory under the ECO test on the basis that U.S. carriers are not legally able to provide the particular service at issue in that country, when the country did not agree to grant such access in its GBT Agreement offer. Even if a GBT Agreement signatory had agreed to open its market but failed to do so, the Commission would violate U.S. commitments by denying market access to carriers from that country under the ECO test. The United States has committed itself to address violations through WTO enforcement procedures, not through unilateral retaliation.

2. Practical Opportunities Factors

The remaining three factors in the ECO test focus on whether there are practical barriers to market entry in the destination country. A carrier demonstrates that there are no practical barriers to market entry by showing the existence of: 1) reasonable and nondiscriminatory

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Agreement); Comments of France Telecom ("France Telecom") at 13-18 (noting that the ECO test is not compatible with U.S. GBT Agreement commitments); Comments of Kokusai Denshin Denwa Co. Ltd. ("KDD") at 3 (noting that the Commission is correct in abolishing the ECO test); Sprint at 3-7 (arguing that the Commission should eliminate the ECO test for U.S. market entrants from both WTO member and non-WTO member countries); Telmex at 3-4 (noting that the GBT Agreement requires the Commission to eliminate its ECO test); Telefónica Internacional at 3-5 (urging the Commission to adopt an unqualified open entry standard for carriers from WTO member countries); Comments of Viatel Inc. ("Viatel") at 2-5 (urging the Commission to eliminate its ECO test); Comments of Wei Fong ("Wei Fong") at 1-2 (arguing that the FCC proposal does not open the U.S. market sufficiently); Comments of WinStar Communications, Inc. ("Win Star") at 4 (noting that the ECO test no longer is necessary in light of the new global competitive conditions created by the GBT Agreement); Comments of Shell Offshore Service Company ("SOSCo") at 4-9 (arguing that the Commission should not apply the ECO analysis to applicants from countries that have made a commitment to provide MFN and NT for all services).

charges, terms, and conditions for the provision of the particular service at issue; 2) competitive safeguards to protect against anticompetitive and discriminatory practices; and 3) a fair and transparent regulatory authority that is separate from the foreign telecommunications operator. Like the first factor, these three components of the ECO test are inconsistent with the GBT Agreement.[16]

The first factor is service specific, which, as demonstrated above, is inconsistent with the "package" approach to WTO Members' offers under the GBT Agreement. The second factor has been replaced by Members' competitive safeguards commitments in the Reference Paper. The absence or inadequacy of such safeguards is enforceable through WTO dispute resolution, not

[16] When adopting the ECO test, the Commission refused to condition entry on cost-based accounting rates because "it would become, in effect, a barrier to market entry." *Foreign Carrier Entry Order* at ¶¶ 65-67. The Commission rejected accounting rate pre-conditions in the pre-GBT Agreement environment. Despite the reported action of the Commission in the *Benchmarks* proceeding, GTE continues to believe that it is unnecessary and unwise to condition entry on cost-based accounting rates. For a further discussion, see Section IIIC, *infra; see also* France Telecom at 22-23 (disagreeing with the Commission proposal to impose benchmark settlement rate conditions on the granting of Section 214 authorization); Comments of the Government of Japan ("Government of Japan") at 3 (noting that it is problematic to adopt benchmark settlement rate conditions on market entry); Comments of the Telecommunications Authority of Singapore ("TAS") at 2 (arguing that accounting rate benchmarks should not be a factor in market entry); Telmex at 7 (urging the Commission not to tie U.S. entry to foreign carriers' compliance with benchmark accounting rates); Telefónica Internacional at 6, 10-14 (arguing that the Commission should not condition foreign carrier entry on its home country's compliance with the proposed benchmarks); *Cf.* AT&T at 24-33 (arguing that facilities-based and resale entry should be conditioned on cost-based accounting rates).

unilateral access denial.[17] Similarly, the third ECO test element -- an independent regulator -- is subsumed under the Reference Paper and enforceable through WTO dispute resolution.[18]

Accordingly, the NPRM and those commenters urging the retention of all or most of the ECO test misapprehend the nature of the market access commitments in the GBT Agreement and the bargain the treaty represents. The United States (like every other GBT Agreement signatory) is required to implement rules to protect against competitive distortions in its markets. That requirement may not, however, be met by violating the market access or nondiscrimination requirements of the GATS and the GBT Agreement. Because the case-by-case application of the ECO test would violate U.S. treaty obligations, the test may not be retained. The GBT Agreement represents a judgment that other WTO Members' offers, taken as a whole, are sufficient consideration for the U.S. offer, including its offer of market access. Continued application of the ECO test would fly in the face of that critical component of the GBT Agreement.

II. THE COMMISSION SHOULD CLARIFY THAT IT INTENDS TO RELY ON "OTHER PUBLIC INTEREST FACTORS" IN MARKET ACCESS DECISIONS ONLY TO THE EXTENT CONSISTENT WITH GATS.

The Commission's proposal to retain discretion to deny applications under section 214 or Title III of the Communications Act or under the Cable Landing License Act[19] on the basis of

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[17] *See, e.g.,* Comments of Nippon Telegraph and Telephone Corporation ("NTT") at 2 (noting that the Commission should rely on the GBT Agreement to address anticompetitive behavior).

[18] *See, e.g.,* France Telecom at 9-12 (noting that the Reference Paper obviates the need for the NPRM's proposals); Comments of GTE Service Corporation ("GTE") at 9-10 (arguing that the Commission should avoid market entry rules that duplicate the regulatory safeguards of the Reference Paper).

"other public interest factors"[20] has attracted substantial attention from several commenters.[21] Most take the position that such factors cannot be the basis for license denials. Executive branch agencies, on the other hand, seek continued deference to their judgments regarding essential national security and law enforcement issues.[22] Their comments express concern that the NPRM may impair their ability to protect vital U.S. interests.

In GTE's view, foreign commenters have overstated the problems with evaluating applications in light of public interest factors, but the NPRM's vagueness on the issue invites exactly such overreaction. Similarly, the Executive branch comments ignore existing GATS provisions that should adequately protect government discretion on matters of critical importance to the United States. GTE recommends that the Commission clarify that it will apply public interest tests, which are, after all, part of the Commission's statutory mandate, but will do so only consistent with the GATS. This approach should leave the Commission and the Executive branch more than adequate latitude to protect vital U.S. interests, including those expressed by the Department of Defense ("DOD") and the Federal Bureau of Investigation ("FBI"), without violating or compromising the integrity of the GBT Agreement.

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[19] 47 U.S.C. §§ 35-39 (1994).

[20] NPRM ¶¶ 43, 62, 74.

[21] *See, e.g.,* European Union at 2-5; Deutsche Telecom at 31-33; France Telecom at 5-6; KDD at 4; Government of Japan at 3.

[22] *See* Comments of the Secretary of Defense ("Secretary of Defense") at 4-11; Comments of the Federal Bureau of Investigation ("FBI") at 2-10; USTR at 2-4.

A. The Commission Should Distinguish Clearly Among The "Other Public Interest Factors" Mentioned In The NPRM.

The NPRM identifies national security, law enforcement, foreign policy and trade concerns as possible bases for the denial of license applications. These same factors were listed in the *Foreign Carrier Entry Order*.[23] Once basic telecommunications have been incorporated into the global regime for trade in services under the GATS, however, these four factors should be treated differently. The GATS plainly acknowledges WTO Members' interests and rights to protect their national security and enforce their domestic laws. Thus, Executive branch concern that the authority has been lost seems misplaced. Foreign policy and trade concerns, however, are not factors sanctioned or recognized by the GATS, except to the extent they rise to the level of national security, health, safety, public order or competition issues.[24] The Commission has not articulated how it will incorporate these factors into its public interest analyses and fails to link its proposed use of these factors to the relevant treaty standards.

The Commission should clarify it will use the national security and law enforcement factors consistent with existing GATS provisions but will not invoke foreign policy or trade concerns to deny market access unless demonstrably consistent with GATS. By doing so, the Commission would substantially, if not fully, answer both the concerns of foreign commenters, who criticized the excessive breadth of the NPRM, and of the DOD and FBI, which foresaw an impaired ability to protect U.S. national security and law enforcement interests.

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[23] Foreign Carrier Entry Order ¶ 62.

[24] *See* GATS, art. XIV and XIV *bis*.

1. National Security

The GATS expressly provides that "[n]othing in this Agreement shall be construed: . . . to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: . . . taken in time of war or other emergency in international relations."[25] The United States has historically taken the position that this exception is entirely self-judging, giving the Executive branch broad discretion to determine when a matter or action will be deemed essential to U.S. national security.[26] It seems unlikely, therefore, that the creation of a presumption in favor of market access by applicants from WTO Members would substantially impair the Executive branch's ability to protect national security.

The GATS also provides exceptions for the maintenance of public order, the preservation of health and safety, and securing compliance with laws otherwise consistent with the treaty.[27] Several of the concerns expressed in the comments by DOD might just as easily be regarded as falling within the safety or public order exceptions in Article XIV as within the national security exception in Article XIV *bis*.[28] In any event, the GATS appears to provide ample latitude to

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[25] *Id.* art. XIV *bis* (1)(b)(iii).

[26] The language of the exception supports this view in expressly linking the availability of the exception to actions the Member considers essential to its security. The incentive for restraint resides in each Member's interest in seeing other Members invoke the exception as rarely as possible.

[27] *See* GATS, art. XIV.

[28] For instance, the Defense Department's comments acknowledge that "[a]mong the other interests to be protected are government efforts to conduct electronic surveillance for national security purposes." Secretary of Defense at 8. Under certain circumstances, electronic surveillance for such purposes might comfortably fit the national security exception in Article

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protect essential interests of the United States. Moreover, the procedures and presumptions suggested in the NPRM need not alter the deference accorded the Executive branch in situations implicating national security.[29]

2. Law Enforcement

The FBI has expressed concern that a presumption in favor of granting licenses to applicants from WTO Members could interfere with national defense and public safety objectives in the Communications Act.[30] As noted above, however, the GATS structure appears to offer ample latitude for the United States to protect not only essential national security interests, but law enforcement concerns affecting public order, health and safety. More specifically, the law enforcement concerns reflected in FBI Director Freeh's May 24, 1995 letter to Representative Dingell[31] appear to be matters within the scope of Articles XIV *bis* or XIV of the GATS. Thus, the ability of the Executive branch agencies to protect those aspects of the public interest entrusted to them by the Communications Act does not seem threatened or impaired by the proposals in the NPRM.

It appears to GTE that the GATS and GBT Agreement leave ample discretion for the nondiscriminatory application of a public interest test that adequately protects essential U.S.

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XIV *bis*, but might also fit within the public order concept of Article XIV, as the protection of national security (even in the absence of an international emergency) could reasonably be argued to be a "fundamental interest of society." *See* GATS, art. XIV n.5.

[29] *See* Secretary of Defense at 8-10; USTR at 4.

[30] FBI at 2, 7, 9.

[31] FBI at 3 and Tab A.

national security and law enforcement interests. The Commission should respond to the objections of foreign commenters by stating that it will balance national security and law enforcement interests with U.S. obligations under the GATS.

3. Foreign Policy and Trade Concerns

The GATS contains no exceptions to allow WTO Members to derogate from their obligations -- including their market access commitments -- on the basis of their foreign policy or trade concerns. Indeed, legitimizing these factors as a basis for market entry denial would risk undercutting the value of a Member's market access commitments and enable the Member to deny entry on criteria that are far from "reasonable, objective and transparent," as required under Article VI of the GATS.

To the extent some foreign policy concerns implicate essential national security interests, they might come within the scope of Article XIV *bis*. It is virtually impossible, however, to imagine how trade concerns not elaborated in the GATS, GBT Agreement or the Reference Paper could possibly be the basis for denying market access in contravention of the commitments of this multilateral trade agreement. Relying on these issues as the bases for denying market access simply invites other countries to do the same, with potentially disastrous consequences for the GBT Agreement's central goal: effective access to foreign markets.[32]

[32] *See, e.g.*, France Telecom at 6 (noting that other countries may follow the U.S. lead in adoption of opaque public interest tests and apply such tests in a manner adverse to competitive telecommunications); European Union at 2 (noting that the U.S. should avoid any action that may jeopardize effective implementation of open market commitments).

B. The Commission Should Better Articulate Its Approach to Public Interest Factors

GTE does not suggest that the Commission ignore the mandates of U.S. law and cease to regulate in the public interest. The Commission could, however, better serve itself and the United States by clearly stating that it will apply its public interest tests in a nondiscriminatory fashion, ensuring that, except as allowed under the GATS, applications from non-U.S. WTO Members will be treated like applications from U.S. entities. Such an approach would be consistent with the GATS without impairing the United States' ability to protect vital non-trade interests potentially affected by the licensing process. Further, it would provide a solid platform for U.S. insistence that other countries not undercut the value of their market access commitments by invoking standards that are less than objective, transparent and nondiscriminatory. Moreover, it should answer virtually all of the complaints of commenters about the NPRM's proposed use of other public interest factors as barriers to market entry.[33]

III. CONDITIONING MARKET ACCESS ON PRESCRIBED ACCOUNTING RATES EXCEEDS THE COMMISSION'S JURISDICTION AND IS INCONSISTENT WITH U.S. OBLIGATIONS.

The Commission's use of accounting rate benchmarks to condition access to the U.S. market is unjustified. Such action exceeds the Commission's jurisdiction and violates U.S. treaty obligations, most notably under the GBT Agreement and GATS. Moreover, any anticompetitive

[33] *See* European Union at 4 (expressing "strong concerns with conditioning access to the U.S. market on such unclear and broad public interest concepts, such as *law enforcement, foreign policy, or trade concerns*")(emphasis in original).

behavior can be addressed adequately by post-entry safeguards under U.S. law and WTO requirements.

A. The United States Lacks Authority To Prescribe Accounting Rates.

As elaborated in its comments in the *Benchmarks* proceeding,[34] GTE questions the Commission's legal authority unilaterally to impose accounting rates. The proposed prescription of accounting rates is wholly inconsistent with the United States' binding obligations under International Telecommunications Union ("ITU") treaties and regulations, which require collaboration among ITU members and international carriers to establish accounting rates.[35] Further, the Commission's *Benchmarks* proceeding is intended to compel foreign carriers to reduce their settlement rates to a level the Commission has unilaterally determined is "cost-based" - an action GTE continues to believe is beyond the Commission's jurisdiction under the Communications Act of 1934. The Commission is empowered to regulate rates charged by U.S. carriers. The Commission is not authorized to prescribe mandatory rates foreign carriers may charge U.S. carriers for access to and use of networks located in foreign countries. Thus, the

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[34] *International Settlement Rates*, IB Docket No. 96-261, FCC 96-484 (Dec. 19, 1996) [hereinafter "Benchmarks" proceeding]. At an open meeting on August 7, 1997, the Commission announced the adoption of its Report and Order in the Benchmarks proceeding. Text of the Report and Order is not yet available. Adoption of the Report and Order notwithstanding, GTE herein incorporates its jurisdictional arguments expressed in the Benchmarks proceeding. *See* Comments of GTE Service Corporation, Benchmarks, Appendix A, A1-A17 (Feb. 7, 1997); Reply Comments of GTE Service Corporation, Benchmarks, 6-12 (Mar. 31, 1997); Supplemental Comments of GTE Service Corporation, Benchmarks, 4-5 (June 24, 1997).

[35] ITU Telecommunications Regulations, Final Acts of the World Administrative Telegraph and Telephone Conference arts. 1.5, 6.2.1 (WATTC-88) (Melbourne, 1988).

inclusion of accounting rate benchmarks in the current proceeding is based on an incorrect understanding of the Commission's jurisdiction and an improper assertion of authority.

B. Conditioning Access To The U.S. Market On Accounting Rates Within The Benchmarks Violates U.S. Obligations Under The GBT Agreement And GATS.

The U.S. market access commitments in the GBT Agreement are very broad. They do not exclude or propose different treatment for WTO Members or carriers agreeing to accounting rates outside of the FCC's unilaterally prescribed benchmarks. Conditioning foreign carrier entry on compliance with those benchmarks would contravene the U.S. GBT Agreement offer. For the reasons set forth in Section I.A., *infra,* the Commission cannot use the competitive safeguards provision of the Reference Paper as a means of unilaterally rewriting U.S. market entry commitments in the GBT Agreement.

AT&T argues that "GATS requirements [do not] limit the ability of the Commission to ensure that the U.S. market is adequately protected against competitive harm."[36] To the extent this position is meant to suggest that, after the effective date of the GBT Agreement and GATS, the Commission has at its disposal all the same regulatory tools it had before that date, it is simply wrong. The Commission will be fully able to protect the U.S. market from competitive harm. It will not, however, be able to rely on mechanisms, like the ECO test, that violate GATS. Once the GBT Agreement and Reference Paper become effective, U.S. rules governing entry must be consistent with U.S. obligations under GATS or they will expose the United States to penalties or retaliation under the treaty.

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[36] AT&T at 16.

The Commission's proposal to condition market entry on accounting rate benchmarks cannot be reconciled with the MFN obligations of the GATS. On any given route, affiliates of a dominant foreign carrier in the destination country would be subject to an FCC-imposed entry criterion that would not be applied to non-affiliated carriers seeking to provide services on that route. This is patently discriminatory and violates both MFN and the requirement that domestic regulations be "impartial."[37] Further, conditioning access on accounting rates is not the least restrictive means of protecting the U.S. market from competitive harm. Such conditional access is facially inconsistent with the U.S. GBT Agreement and WTO obligations. Moreover, as discussed below, less burdensome safeguards consistent with such obligations are available and likely to be effective.

C. The "Price Squeeze" Theory Does Not Support The Market Access Conditions Suggested In The NPRM And By Certain Commenters.

Apart from jurisdictional concerns and potential violations of U.S. GATS obligations, reliance on a "price squeeze" theory as justification for market entry conditions is misplaced. Indeed, sufficient post-entry safeguards are available.

1. The Price Squeeze Theory Ignores the Reality of Developing Global Competition.

The "Price Squeeze" theory is rooted in a static view of the world; it ignores the rapid change in global telecommunications markets and the direct and indirect competitive pressures that exist and are expanding. Among these forces are the GBT Agreement and the pro-

[37] *See* GATS, art. VI.